



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 27, 1994

Mr. Gerald G. Morgan, Jr.
Burdett, Morgan & Thomas
5700 S.W. 45th Street
Amarillo, Texas 79109

OR94-278

Dear Mr. Morgan:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552 (formerly V.T.C.S. article 6252-17a).¹ We assigned your request ID# 25982.

The Moore County Development Board (the "development board"), which you represent, has received a request for "a copy of the lawsuit settlement reached with the Moore County YMCA."² You ask whether the development board is subject to the Open Records Act and, if so, whether the development board may withhold the requested information under section 552.103(a) of the Government Code (formerly section 3(a)(3), V.T.C.S. article 6252-17a).

The Open Record Act's definition of "governmental body," found in section 552.003 of the Government Code, includes the following:

the part, section, or portion of an organization, corporation, commission, committee, institution, or agency that spends or that is supported in whole or in part by public funds.

¹We note that the Seventy-third Legislature repealed V.T.C.S. article 6252-17a. Acts 1993, 73d Leg., ch. 268, § 46. The Open Records Act is now codified in the Government Code at chapter 552. *Id.* § 1. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47.

²In addition, the requestor seeks to attend the development board's meetings in accordance with the Texas Open Meetings Act, Government Code chapter 551. The attorney general may address the applicability of the Open Meetings Act only within the scope of an attorney general opinion requested pursuant to chapter 402 of the Government Code. You are not authorized to request an attorney general opinion. See Gov't Code § 402.042 (listing persons who may request an attorney general opinion). Accordingly, we have no authority to address in this ruling whether the development board is subject to the Open Meetings Act.

Gov't Code § 552.003(a)(10) (emphasis added). Courts, as well as this office, previously have considered the scope of the Open Records Act's definition of "governmental body." In *Kneeland v. National Collegiate Athletic Association*, 850 F.2d 224 (5th Cir. 1988), *cert. denied*, 488 U.S. 1042 (1989), the United States Court of Appeals for the Fifth Circuit recognized that opinions of the Texas Attorney General do not declare private persons or businesses "governmental bodies" subject to the act "simply because [the persons or businesses] provide specific goods or services under a contract with a government body." *Kneeland*, 850 F.2d at 228. Rather, when interpreting the predecessor to section 552.003 of the Government Code, the *Kneeland* court noted that the attorney general's opinions generally examine the facts of the relationship between the private entity and the governmental body and apply three distinct patterns of analysis:

The opinions advise that an entity receiving public funds becomes a governmental body under the Act, unless its relationship with the government imposes "a specific and definite obligation . . . to provide a measurable amount of service in exchange for a certain amount of money as would be expected in a typical arms-length contract for services between a vendor and purchaser." Tex. Att'y Gen. No. JM-821 (1987), *quoting* ORD-228 (1979). That same opinion informs that "a contract or relationship that involves public funds and that indicates a common purpose or objective or that creates an agency-type relationship between a private entity and a public entity will bring the private entity within the . . . definition of a 'governmental body.'" Finally, that opinion, citing others, advises that some entities, such as volunteer fire departments, will be considered governmental bodies if they provide "services traditionally provided by governmental bodies."

Id. In *Kneeland* the court found that although the National Collegiate Athletic Association ("NCAA") and the Southwest Athletic Conference ("SWC") receive public funds, the two organizations do not qualify as governmental bodies under section 552.003 of the Government Code because the funds the NCAA and the SWC received were not for their general support, but rather were received in exchange for known, specific, and measurable services. *Id.* at 225-31.

As the *Kneeland* court noted, when considering the breadth of the act's definition of "governmental body," this office has distinguished between private entities receiving public funds in return for specific, measurable services and entities receiving public funds as general support. For example, in Open Records Decision No. 228 (1979), we considered whether the North Texas Commission (the "commission"), a private, nonprofit corporation chartered for the purpose of promoting the interests of the Dallas-Fort Worth metropolitan area, constituted a "governmental body" under the act. Open Records Decision No. 228 at 1. The contract existing between the commission and the City of Fort Worth obligated Fort Worth to pay the commission \$80,000 per year for three years. *Id.* The contract obligated the commission to, among other things, "continue

its current successful programs and implement such new and innovative programs as will further its corporate objectives and common city's interests and activities." *Id.* at 2. We found that this broad provision failed to impose on the commission a specific and definite obligation to provide a measurable amount of service in exchange for a certain amount of money, as one would expect to find in a typical arms-length contract for services between a vendor and a purchaser, and thus failed to provide adequate consideration flowing to the cities supporting the commission. *Id.* The contract therefore placed Fort Worth, and other cities engaged in identical contracts with the commission, in the position of providing general support for the operation of the commission. *Id.* Accordingly, we found the commission to be a governmental body for purposes of the act. *Id.*³

We have examined the submitted copy of the development board's articles of incorporation (hereinafter "ARTICLES OF INCORPORATION") adopted under the Texas Non-Profit Corporation Act, V.T.C.S. article 1396-1.01. The development board receives from the City of Cactus, Texas, funds from a grant received under the federal Economic Development Act, 42 U.S.C. § 3121. *See* ARTICLES OF INCORPORATION art. 4, at 2. Generally, the funds transferred from the City of Cactus must be used in a manner consistent with the Economic Development Act. *Id.* While the City of Cactus and Moore County may be receiving valuable services in exchange for the public funds provided the development board, we find that the general provisions of the articles of incorporation indicate that the development board does not have a specific and definite obligation to provide a measurable amount of service in exchange for a certain amount of money. According to the articles of incorporation, the City of Cactus provides general support for the operation of the development board. We conclude, therefore, that the development board constitutes a "governmental body" within the meaning of section 552.003 and that the development board must release all of the requested information in its possession unless the information falls within one of the exceptions enumerated under the Open Records Act.

³*See also* Attorney General Opinions JM-821 (1987) (volunteer fire department received general support from rural fire prevention district because department received public funds from district to provide all of district's needed services, as well as other close ties); JM-116 (1983) (Gulf Star Conference, intercollegiate athletic conference, was governmental body subject to act because funds member colleges pay to Conference used for general support); MW-373 (1981) (University of Texas Law School Foundation, nonprofit corporation that solicits donations and expends funds to benefit University of Texas Law School, was governmental body because university provided foundation with office space, utilities and telephone, and reasonable use of university's equipment and personnel); Open Records Decision Nos. 621 (1993) (holding that Arlington Economic Development Foundation and Arlington Chamber of Commerce, to the extent that it receives funds from City of Arlington, are subject to Open Records Act); 602 (1992) (Dallas Museum of Art was governmental body only to extent that it received support from City of Dallas and State of Texas); 509 (1988) (holding that the Austin-Travis County Private Industry Council, Inc., established to administer federal funds granted to the state under the federal Job Training Act, was a governmental body because of its support by public funds); 302 (1982) (Brazos County Industrial Foundation, nonprofit corporation, was governmental body subject to act because it received unrestricted grant from City of Bryan); 195 (1978) (holding that Hidalgo County Jobs for Progress, Inc., was a governmental body subject to the Open Records Act, because its purpose to assist low-income persons with education, job training, and job placement, was supported by public funding from Hidalgo County as well as federal funding and funding from other local sources).

You claim that section 552.103 of the Government Code excepts the requested information from required public disclosure. To secure the protection of section 552.103, a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 551 (1990). We note, however, that, although you assert section 552.103, you do not explain how it applies. You are responsible for submitting in writing the reasons you believe the requested information is excepted from disclosure. Under the Open Records Act, all information held by governmental bodies is open to the public unless it is within a specific exception to disclosure. The custodian of records has the burden of proving that records are excepted from public disclosure. Attorney General Opinion H-436 (1974). If a governmental body does not claim an exception or fails to show how it applies to the records, it will ordinarily waive the exception unless the information is deemed confidential by the act. *See* Attorney General Opinion JM-672 (1987). Because you have not explained the applicability of section 552.103, we conclude that you may not withhold the requested information under that exception. Accordingly, the development board must release the requested information in its entirety.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Open Government Section

LRD/GCK/rho

Enclosed: Submitted documents

Ref.: ID# 25982

cc: Mr. Todd J. Hepler
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(w/o enclosures)